UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KELCI STRINGER, Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Case No. 2:03-cv-665 Judge Holschuh Magistrate Judge Abel

SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF THE NFL DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

At the December 12, 2005, hearing, this Court ordered supplemental briefing principally to determine whether plaintiff's claims against the NFL Defendants, which are assertedly based on Section 324A(b) of the Restatement of Torts, are subject to labor preemption under the Sixth Circuit's two-step analysis set forth in the Mattis and DeCoe decisions. The Court's request for supplemental briefing followed this exchange:

> THE COURT: I think we have established, if I am not mistaken, that plaintiff's claims are really based upon a state law claim under 324A; is that correct?
>
> MR. DeMARCO: Yes. I would say both prongs, but certainly the second prong is the stronger of the two. And Ohio and Minnesota law is the same, as Mr. Levy suggested, I think, on that.

(Block Decl., Ex. A, at 57:17-23; see id. at 35-44.) The "second prong," Section 324A(b), addresses an alleged breach of a duty by one (here, the NFL) who "has undertaken to perform a duty owed by the other [here, the Minnesota Vikings] to the third person [here, Mr. Stringer]." Restatement (Second) of Torts § 324A(b).

Plaintiff's supplemental filing attempts to circumvent the second prong of the required inquiry -- whether the duties and rights invoked arise from the CBA -- and essentially ignores the first prong -- whether resolution of her claims will require interpretation of the CBA. Instead, Plaintiff proposes *additional* theories of potential liability -- theories assertedly unrelated to Section 324A(b) -- that she contends reflect the existence of a duty on the part of the NFL Defendants wholly apart from the collectively-bargained duties owed by the Vikings to Mr. Stringer. But these new theories -- indeed, the great bulk of Plaintiff's supplemental brief -- are irrelevant to the issue presented by this motion, because they all would require interpretation of the CBA, both to determine the source or scope of the duty allegedly assumed, as well as to determine whether any alleged breach of that duty was the proximate cause of Mr. Stringer's death (see p. 7, below). Thus, these alternative theories cannot salvage Plaintiff's claims from preemption.

There is no dispute that the Minnesota Vikings had a *comprehensive, collectively-bargained* duty to provide their player-employees a safe workplace and reasonable medical care. To establish liability under Section 324A, Plaintiff must therefore demonstrate that the NFL undertook to perform that duty -- "a duty *owed by the other*," the Vikings, to Mr. Stringer -- and that a breach of that duty was the proximate cause of Mr. Stringer's death.

To establish liability under Section 324A(b), the plaintiff must prove, as the Sixth Circuit has *repeatedly* held, that the defendant "completely supplanted" the "duty owed by the other" to the plaintiff. See NFL Defs.' Supp. Mem. at 8-9 (citing, inter alia, Schindler v. United States, 661 F.2d 552, 561-62 (6th Cir. 1981), Myers v. United States, 17 F.3d 890, 903 (6th Cir. 1994), and McAtee v. Fluor Constructors International, Inc., 188

F.3d 508 (Table), 1999 WL 685928, at *6 (6th Cir. Aug. 27, 1999)). That principle is reflected in the only Comment to Section 324A itself:

> "d. *Undertaking duty owed to third person*. Even where the negligence of the actor does not create any new risk or increase an existing one, he is still subject to liability if, by his undertaking with the other, he has undertaken a duty which the other owes to the third person. Thus a managing agent *who takes charge of a building* for the owner, and agrees with him to keep it in proper repair, assumes the responsibility of performing the owner's duty to others in that respect. He is therefore subject to liability if his negligent failure to repair results in injury to an invitee upon the premises who falls upon a defective stairway, or to a pedestrian in the street who is hurt by a falling sign."

Id. at § 324A, Comment d (second emphasis added).

Accordingly, for *preemption* purposes, the dispositive question is: Can the Court determine whether, *and if so to what extent*, the NFL has undertaken to perform the Vikings' collectively-bargained duties without interpreting the Collective Bargaining Agreement?[1]

How can this Court determine whether the NFL "completely supplanted" or "took charge" of the Vikings' comprehensive, collectively-bargained duty to provide Mr. Stringer with a safe workplace and reasonable medical care without first determining the scope of that duty under the Collective Bargaining Agreement? The NFL Defendants' prior memoranda identified numerous provisions of the Collective Bargaining Agreement that imposed on the Vikings duties -- *all of which are potentially implicated by the*

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[1] This assumes that the claim does not collapse at the threshold because the NFL is not an "other" within the meaning of Section 324A. Plaintiff is alleging, in effect, that the NFL clubs collectively assumed and then breached the obligations and duties -- arising out of the CBA -- that each club owed individually to its player-employees. Regardless of whether the NFL Defendants assumed any of these duties, it is clear that the duties assertedly breached originally ran from the Vikings to Mr. Stringer and emanate from the CBA, which requires preemption under the second Mattis/DeCoe prong.

circumstances of Mr. Stringer's death -- relating to player medical care and/or workplace safety. *See* NFL Defs.' Mot. to Dismiss at 8-10; NFL Defs.' Supp. Mem. at 11. The NFL Defendants also demonstrated (Supp. Mem. at 12) that in order to determine whether the NFL had "completely supplanted" the duties imposed by those provisions, this Court would have to define and interpret *each* of those provisions to determine its scope.

The NFL Defendants pointed to, among other CBA provisions:

- Article XLIV § 5, which explicitly requires a standard pre-season physical examination, but which requires interpretation to determine whether the prescribed examination encompasses heat-related injuries or illnesses;
- Article XLIV § 1, which explicitly requires that club physicians inform the player and his coaches if illnesses or injuries "could be significantly aggravated by continued performance," but which requires interpretation to determine whether this obligation encompasses heat-related injuries or illnesses;
- Article XLIV §§ 1 and 2, which explicitly prescribe certification requirements for club physicians and club trainers, but which require interpretation to determine whether these professionals must have training or experience in heat-related injuries and illness;
- Article XXXVII § 5, which explicitly limits the training camp reporting date for veteran players, but which requires interpretation to determine whether there are heat or weather-related conditions on the activities that may be required of players after that date; and
- Paragraph 8 of the standard NFL Player Contract, found in Appendix C of the CBA, which explicitly obligates the player to (i) "report promptly for and participate fully" in the club's training camp and (ii) to "maintain himself in excellent physical condition," but which requires interpretation to determine if these provisions obligate the player to be prepared for hot weather conditions at training camp and/or obviate any obligation on the club's part to acclimate him to hot weather conditions prior to requiring his participation in training camp drills.

Plaintiff's supplemental brief ignores all of these provisions, as well as the numerous allegations in her Complaint that necessarily invoke them. It not only fails to identify the scope of the Vikings' duties assumed by the NFL; it also fails to identify any principled basis for distinguishing between (a) the collectively-bargained duties relating to heat,

workplace safety or medical care, if any, that were *retained* by the Vikings, and (b) the collectively bargained duties assertedly "supplanted" by the NFL.

Instead, Plaintiff blithely and incorrectly asserts that the cases upon which the NFL Defendants rely, as well as Judge Becker's thoughtful analysis in the Blessing case, do not reflect *Ohio* law, which in any event has no application here.[2] The common law principles reflected in Section 324A(b) -- including the requirement that the defendant "completely supplant" the third party's duty -- are the same under New York, Minnesota, *and* Ohio law. See, e.g., Espinal v. Melville Snow Contractors, Inc., 773 N.E.2d 485, 488 (N.Y. 2002) (liability attaches under Section 324A(b) when the defendant "has entirely displaced the other party's duties"); Satterlund v. Murphy Bros., Inc., 895 F. Supp. 240, 244-45 (D. Minn. 1995) (no liability when defendant did not "appreciably, let alone effectively usurp[] the safety responsibilities of [the employer]") (citing In re Norwest Bank Fire Cases, 410 N.W.2d 875, 879 (Minn. Ct. App. 1987)); Bugg v. Am. Standard, Inc., 2005 WL 1245043, at *3 (Ohio Ct. App. May 26, 2005) (plaintiff could not assert a Section 324A(b) claim when the "defendants never undertook to perform the duties" owed to the

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[2] The Sixth Circuit has squarely held that in wrongful death cases, federal courts in Ohio must apply the law of the forum where the injury occurred -- here, Minnesota -- unless some other forum has a more significant relationship to the events and parties. See NFL Defs.' Supp. Mem. at 8 n.4 (citing Bowman v. Koch Transfer Co., 862 F.2d 1257, 1259-60 (6th Cir. 1988)); see also Morgan v. Biro Mfg. Co., 15 Ohio St. 3d 339, 341-42, 474 N.E.2d 286, 288-89 (Ohio 1984) (establishing Ohio choice-of-law rules for personal injury actions, including claims of wrongful death). No such relationship to Ohio has even been suggested here. Plaintiff's reliance on choice-of-law rules applicable to contract actions is badly misplaced. See, e.g., Supp. Opp. at 4-5 (discussing Mecanique C.N.C., Inc. v. Durr Environmental, Inc., 304 F. Supp. 2d 971, 975 (S.D. Ohio 2004)).

injured employee by his employer); see also p. 1, above (reflecting plaintiff's counsel acknowledgment that Minnesota and Ohio law are the same).[3]

Virtually none of the cases upon which Plaintiff relies has anything to do with labor preemption; indeed, very few have anything to do with Section 324A(b). In Wissel v. Ohio High School Ass'n, 78 Ohio App. 3d 529, 542, 605 N.E.2d 45, 466-67 (Ohio Ct. App. 1992), for example, the court did not decide whether Section 324A(b) would support a finding of liability because the parties had not briefed the issue. In Thelen v. Spillman, 86 N.W.2d 700, 703-04 (Minn. 1957), which involved one motorist signaling another that it was safe to pass, there was no allegation that defendant had "undertaken to perform a duty owed by the other to a third person," so the principles underlying Section 324A(b) had no application.

In short, plaintiff's fixation on whether or not the NFL Defendants assumed a duty *unrelated* to the Vikings' comprehensive, collectively-bargained duty to provide a safe workplace and reasonable medical care -- and plaintiff's citation of "voluntary duty" cases that do not purport to address LMRA preemption -- miss the point: In order to determine whether the NFL Defendants have "undertaken to perform a duty owed" by the Vikings to the Vikings' player-employees, the Court would necessarily have to interpret provisions of the Collective Bargaining Agreement, thereby preempting Plaintiff's claims under the first prong of the Mattis/DeCoe analysis. See NFL Defs.' Supp. Mem. at 10-13.

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[3] Plaintiff's suggestion that the principles espoused in Blessing and the Sixth Circuit cases cited in the NFL Defendants' Supplemental Memorandum are limited to FTCA cases is also flatly incorrect. See, e.g., Hutcherson v. Progressive Corp., 984 F.2d 1152, 1156 (11th Cir. 1993) (insurer that conducted safety inspections not subject to liability under Section 324A(b) for injuries suffered by insured's employees); Ricci v. Quality Bakers of Am., Inc., 556 F. Supp. 716, 720-21 (D. Del. 1983) (bakery cooperative which made general safety recommendations not liable under Section 324A(b) because it did not assume the duty to provide a safe workplace owed by bakery employer to its employees).

In any event, and regardless of the *theory* of liability asserted by plaintiff, the Court would also have to interpret the Collective Bargaining Agreement to determine whether the NFL Defendants' alleged conduct was the proximate cause of Mr. Stringer's injuries. See Good v. Ohio Edison Co., 149 F.3d 413, 420-21 (6th Cir. 1998) (discussing proximate cause under Restatement Sections 323 and 324A). For example, in order to demonstrate that the Hot Weather Guidelines were a substantial cause of Mr. Stringer's death, Plaintiff would have to show that publication of those Guidelines in the Game Operations Manual "increased the risk" of injury "over what it would have been had the defendant not engaged in any undertaking at all" and/or that Vikings or Mr. Stringer were induced by the Guidelines "to forgo other remedies or precautions against the risk." Id. at 149 F.3d at 420-21 (quoting and citing Myers, 17 F.3d at 903); see also Raymer v. United States, 660 F.2d 1136, 1143 (6th Cir. 1981) (similar). Each of these inquiries, in turn, would require interpretation of the CBA to determine not only the duties of the Vikings in the areas of workplace safety and healthcare, but also the responsibilities of Mr. Stringer, who was obligated, among other things, to report to training camp in "excellent physical condition."

* * *

With regard to the remaining counts of the Complaint, Plaintiff did not, and cannot, refute the NFL Defendants' showings, supported by undisputed declarations, (i) that the NFL Game Operations Manual applies only to the conduct of NFL Games, not NFL training camps, and (ii) that neither the NFL nor NFL Properties "required" or "approved" the wearing in training camp of any helmets or shoulder pads, much less the particular helmets and shoulder pads, manufactured by Riddell, about which Plaintiff complains. See NFL Supp. Br. at 2, 5-6; Davey Decl. ¶¶ 6-8; Gertzog Decl. ¶¶ 2, 4, 7.

Despite the Court's having reminded Plaintiff's counsel of the availability of Rule 56(f) at oral argument (see Block Decl. Ex. A, at 28:20-29:12), Plaintiff has not submitted an affidavit demonstrating, as required under Federal Rule of Civil Procedure 56(f), why discovery is needed before a dispositive ruling here. See, e.g., Cacevic v. City of Hazel Park, 226 F.3d 483, 488 (6th Cir. 2000) ("The importance of complying with Rule 56(f) cannot be overemphasized"). "An unsworn memorandum opposing a party's motion for summary judgment is not an affidavit." Id. (quoting Radich v. Goode, 886 F.2d 1391, 1394 (3d Cir. 1989)). Plaintiff's deliberate decision not to file such an affidavit -- let alone to make any showing that discovery is needed in order to oppose the NFL Defendants' Motion -- confirms that the instant motion, which has been pending for a very lengthy period, should be granted now. See, e.g., Ball v. Union Carbide Corp., 385 F.3d 713, 720 (6th Cir. 2004) (no abuse of discretion to grant summary judgment when party does not comply with Rule 56(f)).

CONCLUSION

Accordingly, and for the reasons stated in prior Memoranda, this Court should dismiss with prejudice the claims against the NFL Defendants or, in the alternative, grant summary judgment to the NFL Defendants with respect to those claims.

Respectfully submitted,

s/Sarah D. Morrison

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April 27, 2006

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Supplemental Reply Memorandum in Support of the Motion to Dismiss of Defendants National Football League, NFL Properties, LLC, and John Lombardo, M.D., was served by the Court's CM/ECF system and by U.S. mail, postage prepaid, on this 27th day of April, 2006, upon the following:

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